Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to Facilitate	)	
Future Development of SMR	)	PR Docket No. 93-144
Systems in the 800 MHz	)	RM-8117, RM 8030
Frequency Band	)	RM-8029
	)	

To: The Commission

COMMENTS

American SMR Company L.C. ("American"), by its counsel, hereby submits its Comments in the above-referenced proceeding in response to the Further Notice of Proposed Rule Making released by the Commission on November 4, 1994.[1] American is opposed to any regulatory framework established by the Commission which will not protect the interests of the previously-filed, currently pending 800 MHz applications. American does not believe that the Further Notice addresses in reasonable fashion, if it addresses these issues at all, the fate of the currently pending SMR applicants. Consequently, American urges that the Commission finish the licensing process it began with the establishment of new rules, and the acceptance of SMR applications pursuant to those new rules, before it allows a few large companies to aggregate all remaining, available SMR frequencies in a single auction and instantly dominate the SMR industry. Specifically, the Commission should

[1] The time for the submission of comments was extended to January 5, 1995, by Order DA 94-1326, released November 29, 1994. Consequently, these Comments are timely filed.

establish grandfather provisions and process all grantable pending SMR license applications to grant prior to holding any auctions for the remaining 800 Mhz spectrum. In the alternative, the Commission should adopt the proposals below which would provide some form of equibable relief to those parties whose applications will otherwise be dismissed as a result of the implementation of the new SMR rules. In support whereof, the following is submitted:

I. Introduction

American SMR is a management company which develops wide-area SMR systems over regional areas throughout the United States. American has entered into agreements with many pending 800 MHz SMR applicants to incorporate their expected licenses into several different wide-area, regional SMR systems. American, and the applicants with whom it has entered agreements, have all expended considerable resources to develop these planned SMR systems, and to file SMR applications with the FCC. These parties will have relied relied on the Commission's Rules to their detriment, if the proposed regulatory changes are implemented without proper resolution and grant of their pending applications.

II. The FCc Should Issue Licenses Under The Current Regulatory Framework Prior to Implementation of New Rules

The Commission refers repeatedly throughout the Further Notice to the treatment to be accorded incumbent licensees pursuant to the new SMR Rules. However, nowhere does it address the issue of pending SMR applications. This omission is distressing, particularly in light of the fact the Commission specifically addressed this issue in the previous rule making in this

proceeding. In the Notice of Proposed Rule Making, 8 FCC Rcd 3950 (1993), the Commission stated:

> "In addition, we believe that as ESMR licensing is implemented, waiting lists will no longer be necessary in the licensing of 800 MHz SMR systems. We therefore propose to eliminate waiting lists for all 800 MHz SMR applications and return all applications that are pending on waiting lists." (footnote omitted)

8 FCC Rcd at 3958.

The Commission's failure to address this issue in the Further Notice could lead to the possibility that this issue will be implemented as proposed in the Notice, without any comment being solicited in the Further Notice. This result is not equitable.

American further urges that the dismissal of all pending applications as proposed in the Notice would be unreasonable on its face, at the same time rising to the level of unacceptable administrative arbitrary and capricious behavior. The only reasonable approach to the implementation of the proposed new SMR licensing scheme would be to grant all of the pending applications prior to the implementation of the new regulatory framework and the holding of any 800 MHz SMR auctions.

III. Alternative Proposals With Respect To Currently Pending SMR Applications

If the Commission refuses to adopt the American proposal to eliminate the backlog of applications prior to the implementation of the new regulatory framework, American urges that the Commission adopt other measures designed to afford some equitable treatment for the penalty suffered by the dismissal of previously-filed applications.

The Commission proposes to open the application process to any qualified applicant. Further Notice, at ¶ 56. However, as it did in the Notice,[2] the Commission also seeks comments on limiting eligibility to incumbent licensees, i.e., only existing SMR operators in a market. If the Commission were in some way to implement eligibility restrictions, parties with pending applications on the same date established for existing licensees should be eligible to bid on 800 SMR licenses under the new Rules, along with existing licensees. Not only would this provide some equitable relief to those parties whose resources were squandered by the dismissal of their SMR application filed in good faith under the SMR Rules currently in existence at the time, but it would also serve to increase the pool of eligible bidders, another desirable goal with respect to the auction regime. Greater competition in the marketplace is not only one of the Commission's fundamental principles, but it would most likely have the additional effect of raising more funds for the United States Treasury through the auction process.

The Commission seeks comment on its proposal to establish designated entities like those it has created in the Personal Communications Service (PCS) Rules. Further Notice, at ¶¶ 87-106. Also, the Commission seeks comment on whether the "lower 80" channels be designated as an Entrepreneur's Block, as in PCS. If so, the Commission seeks comment regarding the possible eligibility criteria. If the Commission were to establish designated entities,

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[2] Notice, *supra*, at p. 3951.

then American proposes that the class of parties whose applications would be dismissed as a consequence of the new SMR rules should be included in the definition of designated entity. The Commission has the authority to expand the class of eligible parties for designated entity status, and should do so here for the same reasons just cited above.[3]

IV. Spectrum Aggregation Limit

The Commission tentatively concludes in the Further Notice at ¶ 20 that there is virtually no risk in allowing unrestricted aggregation of SMR spectrum in one Major Trading Area, including up to all 14 MHz in one licensee. Comments are sought on the proposal to allow licensees to acquire all of the MTA spectrum blocks in a market.

American vigorously opposes this tentative conclusion for several reasons. First, and perhaps foremost, Congress itself in

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[3] The Commission has limited the scope of a "designated entity" to small businesses, rural telephone companies and female and minority-owned businesses. See Second Report and Order, 9 FCC Rcd 2348 (1993). However, Congress included in the section of the Communications Act authorizing competitive bidding, i.e., Section 309(j), specific language establishing a broader definition of designated entity:

> "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women". 47 U.S.C. 309(j)(3)(B). See also Section 309(j)(4)(A) (consider alternative payment methods which promote the objectives of (3)(B)); and Section 309(j)(4)(C)(ii) (promote economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women.)

the language of the Communications Act authorizing competitive bidding, i.e., Section 309(j), specifically states that the mandate of the auction procedures are:

> "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants..." (emphasis supplied) 47 U.S.C. 309(j)(3)(B).

The Commission's proposal directly contravenes this cornerstone of the Congressional mandate regarding auctions of spectrum. Furthermore, the Commission's proposal defies common sense. The alleged competitive "congestion" caused by existing SMR licensees cannot counterbalance the potential for abuse created in the excessive concentration of SMR licenses in one entity. Nor does the comparison to spectrum available in the cellular and PCS services to the proposed aggregation limit for the SMR licensees, a comparison akin to the proverbial apples and oranges, validate the proposal to allow the concentration of so many SMR licenses in one entity. Fundamental notions of fairness, and specific Congressional mandate, require the Commission to limit the aggregation of spectrum by one SMR licensee.

WHEREFORE, the foregoing premises considered, American SMR

respectfully requests that the Commission adopt the proposals contained in these Comments.

Respectfully submitted,

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